STATE OF MICHIGAN

COURT OF APPEALS

NAPOLEON TOWNSHIP,

Plaintiff-Appellant,

v

MICHAEL O. NEVINS and DIANE L. NEVINS,

Defendants-Appellees.

UNPUBLISHED
May 1, 2007

No. 273870
Jackson Circuit Court
LC No. 06-001935-CZ

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiff Napoleon Township (township) appeals as of right the trial court order granting summary disposition in favor of defendants in this zoning enforcement action in which the trial court found that the township was estopped from claiming violation of a 50-foot setback requirement and that, regardless, there was no factual basis supporting the alleged violation. We reverse and remand for further proceedings.

I. Complaint and Answer

The township filed its complaint on July 27, 2006, alleging that defendants owned real property within the township's boundaries, thereby making the property subject to the township's zoning ordinances. The township asserted that defendants had commenced construction of a boathouse on their premises located at the water's edge and that the boathouse had three open sides and a roof that was held up by beams or pillars. According to the township, the boathouse constituted a "structure" under its zoning ordinances.[1] Pursuant to the zoning ordinances, defendants' property is zoned as single-family residential and is considered a waterfront lot, and structures on waterfront lots are subject to a 50-foot setback from the high water line.[2] As alleged by the township, the boathouse violated the 50-foot setback requirement

[1] Napoleon Township Ordinance § 2.1 defines "structure" as "[a]nything constructed or erected, the use of which requires a temporary or permanent location on the ground or is attached to something having a permanent location in, on, or below the ground except parking lots, driveways, sidewalks, and signs."

[2] Napoleon Township Ordinance § 3.3.3(E) provides that "[a] waterfront lot shall provide a fifty
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as the structure, i.e., boathouse, was less than 50 feet from the high water line. The township maintained that, before building or completing the boathouse, defendants were required to apply for and obtain a variance, which they had not done.

The township further alleged that its zoning administrator had posted a stop-work order on the boathouse on July 12, 2006, in light of the zoning violation, but defendants ignored and forcibly removed the stop-work order and continued the construction. The township asserted that defendants' actions violated the zoning ordinance, which violation constituted a public nuisance in fact and a nuisance per se. The township prayed for an injunction permanently enjoining defendants from continuing construction in violation of the ordinance. The township additionally requested that the court order defendants to remove the boathouse and prohibit reconstruction, absent a proper variance.

In defendants' answer, they contended that the setback requirement was inapplicable to the boathouse[3] because it was not located on the grounds of their property, but rather over the waters of Big Wolf Lake. Therefore, the boathouse did not constitute a "structure" as defined in the ordinance, and thus the 50-foot setback requirement was not implicated. Accordingly, there was no ordinance violation and no variance was necessary. Defendants also contended that construction of the boathouse had commenced several months before the complaint was filed without objection and that the boathouse was substantially completed by the time the stop-work order was posted. In their affirmative defenses, defendants asserted, in part, that the Michigan Department of Environmental Quality (DEQ) had exclusive jurisdiction over the boathouse because it was located over the waters of an inland lake and that the township was estopped on equitable principles from pursuing a zoning enforcement suit.

II. Defendants' Motion for Summary Disposition

On August 25, 2006, defendants moved for summary disposition pursuant to MCR 2.116(C)(8). Defendants asserted that in April 2005 they hired a consulting firm to design and obtain all of the required permits for the boathouse. According to defendants, later in April of 2005, they had a lengthy conversation with the township's building inspector, Tom Nolte, regarding the boathouse, and Nolte indicated that no township permits were necessary because the boathouse was being built over the lake. Nolte, however, stated that he would need to double check on the matter. Defendants claimed that Nolte followed up in late April 2005 by confirming that no township permits were required.[4] In September 2005, defendants obtained a permit from

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(50) foot setback from the high water line." Napoleon Township Ordinance § 2.1 defines "setback" as "[t]he minimum required horizontal distance between the building or structure and the front, side, and rear lot lines."

[3] Defendants indicated that the "boathouse," which is the terminology used by the township, is more accurately described as a "permanent boat lift and cover" because it has no walls and is not otherwise enclosed. For purposes of this opinion and for simplicity's sake, we shall make reference to the "boathouse."

[4] Defendants submitted no documentary evidence regarding these alleged discussions with Nolte. We make this note understanding that defendants filed the motion under MCR 2.116(C)(8), but for reasons that will become clear below, it is a relevant point. In response to defendants' (continued…)

the DEQ that allowed defendants to dredge a channel in Big Wolf Lake, remove the existing seawall, dredge the channel onto the property to create a boatwell, install a new seawall, and construct a covered boatlift over the boatwell.[5] It was defendants' belief that only the DEQ permit was necessary for the project. Defendants alleged that they began construction in January 2006, which involved the use of heavy machinery for purposes of dredging.[6] Defendants' motion further asserted that on May 29, 2006, a public complaint was filed regarding construction of the boathouse. Kevin Whitt, the township's zoning administrator, contacted defendants the following day by phone concerning the complaint, and subsequently Whitt and the township's attorney visited the property.[7] But they allegedly found no problems with the project and told defendants that they were free to proceed as the matter was governed by the DEQ.[8] Defendants continued building; however, a second complaint was filed by a township resident in June 2006 regarding the project.[9] Defendants maintained in the motion that in July 2006, Whitt and township police, without notice, posted a stop-work order on the boathouse for failure to obtain a building permit, at which point the project was ninety percent complete.[10] Defendants pointed out that the lawsuit was not based on failure to obtain a building permit; rather, it was commenced for failure to satisfy the 50-foot setback ordinance, which was the first time that said ordinance was even raised by the township. Defendants argued that they had relied on the township's acquiescence and approval relative to the project, expending considerable time

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motion, the township neither admitted nor denied the allegations regarding all communications by and to Nolte as it had insufficient information and knowledge.

[5] Defendants submitted a copy of the permit, which specified the permitted activity as follows:

> Dredge approximately 45 cubic yards of material from Big Wolf Lake to create a channel approximately 40 feet long, 10 feet wide at the bottom and 3 feet deep. All spoils from the lake dredging shall remain on-site. Remove a 16 feet long section of the existing steel seawall from the lake. Dredge approximately 85 cubic yards of material from the upland to create a boatwell approximately 32 feet long, 16 feet wide, to a depth of 3 feet below the surface of the lake. Install approximately 80 linear feet of steel seawall to hold the soil around the sides of the boatwell and tie in with existing steel seawall. Construct a covered boat lift over the new boatwell as shown on attached plan 7 of 8. All work authorized by this permit shall be completed in accordance with the attached specifications and modified plans dated August 26, 2005.

[6] The township answered these allegations by neither admitting nor denying.

[7] The allegations regarding the May 29, 2006, complaint by a township resident, along with the allegations that Whitt contacted defendants the next day and followed up thereafter with a site visit with the township's attorney, were all admitted in the township's response to the motion.

[8] These allegations were denied as untrue in the township's response to the motion.

[9] The allegation regarding a second complaint was admitted by the township.

[10] The township admitted that the stop-work order was posted as claimed by defendants; however, it denied that the project was 90 percent complete as asserted.

and money on the project, and that the doctrine of estoppel demanded that defendants be allowed to complete the construction unfettered by the township's interference.[11]

Defendants also argued that the township's zoning ordinance is preempted by the Natural Resources and Environmental Protection Act administered by the DEQ.[12] Finally, defendants argued that the boathouse was not a "structure" under the zoning ordinance and that the setback requirements only applied landward of the high water line, but the boathouse was located before this line when viewed from the lake.

The township responded, arguing that, pursuant to *Fass v Highland Park*, 326 Mich 19; 39 NW2d 336 (1949), the township was not estopped from enforcing its zoning ordinance by the possibly erroneous representations of its zoning officials. The township also argued that there was no state preemption of the zoning ordinance, and it reiterated that the boathouse was a structure subject to the 50-foot setback. Finally, the township maintained that the 50-foot setback was to be measured from the high water line in all directions, thereby encompassing the boathouse. The township submitted an affidavit by Whitt, the zoning administrator, in which Whitt averred, contrary to defendants' assertions, that the May 2006 visit by himself and the township's attorney to the property resulted in Whitt informing defendants "that it would be necessary to investigate the matter further in order for the township to formulate an official position." Whitt further averred that, thereafter, it was determined that the boathouse violated the setback requirements and that he conveyed to defendants that the structure would not be permitted absent a successful building permit. Whitt stated that the stop-work order was posted on the boathouse on July 11, 2006, which defendants ignored. With respect to whether the boathouse was a "structure" for purposes of the 50-foot setback, Whitt claimed:

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[11] The township neither admitted nor denied the allegations regarding the amount of time and money expended by defendants relative to the building project. Defendants submitted no documentary evidence regarding the allegations that heavy machinery was used in the dredging, that the boathouse was 90 percent complete at the time of the stop-work order, and that considerable time and money were expended in constructing the boathouse. However, defendants did submit a Napoleon Township Enforcement Report. This report reflected that there had been citizen complaints about the project and whether it complied with the law, that defendants had obtained the appropriate permit from the DEQ, and that a township official, apparently Whitt, and the township's counsel went to the site in May 2006, with the attorney recommending that the matter be governed by the DEQ. The report further reflected that an issue developed in June 2006 regarding whether the project was consistent with the building plans submitted to the DEQ, that in early July 2006 the DEQ indicated that the plans submitted by defendants met the DEQ's requirements, that the DEQ informed the township that the DEQ's permit was not a building permit and that a township building permit would still be needed, and that, because there was no building permit issued, a stop-work order was posted on the boathouse. The report indicated that defendants refused to stop the work despite the township's insistence that a permit was necessary. A July 13, 2006, entry in the report provided, "Since a permit was not pulled, the stop wrok [sic] order must stay in place until a permit is pulled, and due to the closeness to the water it would be denied, and then it must go through a variance hearing." It is not clear whether this was communicated to defendants.

[12] There are no appellate issues regarding this claim.

> While the roof portion of defendants' structure is over the water, that portion of the structure which supports the roof is located entirely on the land, as evidenced by the attached photographs, for which reason, defendants' boatlift clearly constitutes a structure within the meaning of the Napoleon Township Zoning Ordinance.

At the hearing on the motion, the trial court, ruling in favor of defendants from the bench, essentially accepted as true defendants' entire version of events and their arguments relative to estoppel. The court concluded that the township was estopped from attempting to enforce the setback requirement. Additionally, the trial court held that the high water mark was modified when the channel was dredged and the boatwell was created, as permitted by the DEQ, such that the new high water mark was the land's end of the new boatwell. That being the case, according to the court, the 50-foot setback went from that point landward and did not encompass the boathouse; therefore, there was no violation of the setback requirement. The trial court concluded by noting that this really was a motion in the form of MCR 2.116(C)(10), but that even under MCR 2.116(C)(8), the township was simply not entitled to any relief.

III. Appellate Analysis

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A trial court's construction of a township zoning ordinance is also reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 605-606; 692 NW2d 728 (2004). Similarly, equitable rulings are reviewed de novo on appeal. *Gorte v Dep't of Transportation*, 202 Mich App 161, 171; 507 NW2d 797 (1993).

The township first argues that the trial court improperly treated defendants' motion for summary disposition under MCR 2.116(C)(8) as if it were a motion brought under MCR 2.116(C)(10). The township contends that hardly any discovery had taken place at the time of the hearing on summary disposition, with the township not yet having an opportunity to depose defendants and township officials who interacted with defendants.[13] The township maintains that there were several claims made by defendants that were simply not supported by documentary evidence, and discovery would help weed out various disputes regarding how events transpired. The township then proceeded to argue that, even if this Court treats the summary disposition motion as a motion brought under MCR 2.116(C)(10), Whitt's affidavit and photographs of the boathouse, which were submitted by the township, established a genuine issue of material fact such that summary disposition should not have been granted.

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[13] The complaint was filed on July 27, 2006, defendants' motion for summary disposition was filed on August 25, 2006, which was within two weeks of the township's answer being filed, and the hearing on the motion was held on September 29, 2006. There is no pretrial or scheduling order contained in the file. In general, summary disposition motions are premature if granted before discovery on a disputed issue has been completed. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005), lv gtd 475 Mich 906 (2006). "Summary disposition may ultimately be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.*

We first find that defendants' motion for summary disposition, despite being pursued under MCR 2.116(C)(8), was treated as a motion brought pursuant to MCR 2.116(C)(10),[14] given that the trial court reflected on facts or alleged facts outside the pleadings in rendering its ruling. Indeed, the trial court itself, for the most part, made this acknowledgment. "It is well-settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005), citing *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). We cannot conclude that the township was misled by defendants' motion for summary disposition considering the nature of the argument and the attachment of two pieces of documentary evidence by defendants. Moreover, the township responded by submitting Whitt's affidavit and photographs, suggesting a realization that the substance of defendants' arguments pertained to whether an issue of fact existed, thereby necessitating submission of documentary evidence, i.e., Whitt's affidavit and the photographs. However, and solely within the context of the estoppel issue, which we shall address first, summary disposition was improper because more discovery was necessary, because material issues of fact were created by Whitt's affidavit, and because defendants woefully failed to support the motion with sufficient documentary evidence.

In *Fass, supra* at 28, our Supreme Court stated that a municipality may not be estopped by the acts of its officers or agents that are contrary to the municipality's zoning ordinance. The Court elaborated:

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[14] MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

> "Most of the cases are to the effect that a municipality is not precluded from enforcing a zoning or fire limit regulation by the fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening the terms of such regulation; and this notwithstanding that the holder of the permit has proceeded thereunder to his detriment before the municipality seeks to enforce the regulation against him." [*Id.* at 28-29 (citation omitted).]

Fass involved a situation in which the plaintiffs were issued licenses in 1945, 1946, and 1947, under provisions of a city ordinance relating to the sale of meat at retail, authorizing them to sell both dressed and live poultry on the premises. But a 1948 request for renewal of the license was denied on the basis that the premises could not lawfully be used for the sale of live poultry pursuant to a zoning ordinance that had been effective since 1942. *Id.* at 21.

The *Fass* decision, however, was somewhat scaled back by our Supreme Court in *Pittsfield Twp v Malcolm*, 375 Mich 135; 134 NW2d 166 (1965), in which the Court denied injunctive relief to a municipality that had sought to enjoin the defendant from operating a dog kennel. The building inspector had erroneously believed that the dog kennel was permissible when he issued a construction permit for the kennel. The inspector had completed the required public notice and posted the permit on the premises. The kennel had been constructed and was in use for over ten months when the municipality filed suit. *Id.* at 137. A sound, concise summary of the analysis in *Pittsfield Twp* is found in *Grand Haven Twp v Brummel*, 87 Mich App 442, 445; 274 NW2d 814 (1978), in which this Court stated:

> As compelling reasons for denying the injunction, the [*Pittsfield Twp*] Court found: (1) both parties had acted noncollusively and in good faith; (2) notice of the special use to be made was published and apparent from the unique structure of the building; (3) the defendant had spent $45,000 for a specialty building that was otherwise of doubtful utility; and (4) plaintiff's suit came ten and one-half months after the kennel had been constructed and begun operating. While parts of the opinion seem to cast the decision as an exception to the nonestoppel rule of *Fass*, we find it more clearly to be an application of the equitable principle that a court will not grant an injunction that works an injustice. Supporting that interpretation is the Court's conclusion in *Pittsfield Twp*: "While no factor is in itself decisive of the case, the entire circumstances, viewed together, present compelling reasons why equity should refuse plaintiff's request for injunction. To do otherwise would be contrary to equity and good conscience." [Citations omitted.][15]

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[15] In *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997), the Supreme Court, addressing the general principles of the doctrine of equitable estoppel, stated:

> One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of

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The *Pittsfield Twp* Court stated that "[a]lthough the principle of nonestoppel was clearly enunciated in . . . *Fass*, there was, however, a clear intimation that the doctrine of nonestoppel of a municipality in the field of zoning is not without exception." *Pittsfield Twp, supra* at 146. The Court continued, stating, "Without the slightest discredit to the rule itself, which rule we expressly affirm, nevertheless this particular case presents exceptional circumstances." *Id.* at 147. Our Supreme Court cited favorably cases from other jurisdictions recognizing estoppel where large expenditures were made in good faith on improving a garage, which was completed, in reliance on a building permit, and where a commercial building was constructed under the general supervision of city agents. *Id.*

Here, there were no affidavits from defendants, no deposition testimony from defendants, no affidavit or deposition testimony relative to the township's building inspector, Tom Nolte, and no affidavit or deposition testimony from the township's attorney regarding the site visit in May 2006. The only documentary evidence in the record bearing directly on the estoppel argument is Whitt's affidavit and the township's enforcement report. Defendants presented no documentary evidence regarding when the project and construction was initiated, the alleged early discussions with Nolte in 2005, any communications or contact between defendants and township personnel from April 2005 to early May 2006, the substance of any discussions with Whitt during the site visit in late May 2006, the amount and type of work that was completed on the project and when various stages of the project were completed, and there was no documentary evidence concerning the time and construction costs expended on the project by defendants. These matters are relevant in the context of whether estoppel was established as a matter of law. There were arguments, allegations, and claims made by defendants as to these matters, which the trial court improperly accepted as true, but no supporting evidence.[16] Considering that defendants argue that the trial court properly treated their motion as one brought under MCR 2.116(C)(10) despite the misnomer, it was imperative for them to support the motion with relevant documentary evidence. See MCR 2.116(G)(3)(b) [motion under subrule (C)(10) must be supported by documentary evidence]. Furthermore, when the documentary evidence that was submitted by the parties is examined, factual issues are discovered. The enforcement report indicates that when the site visit was done in May 2006, the township's attorney recommended letting the issue of construction be governed by the DEQ. The report does not indicate whether this was communicated to defendants, nor does it indicate anything that might have been stated by Whitt. Assuming that the report can even be read as providing that the attorney told defendants that the DEQ controlled the matter, Whitt's affidavit indicated the contrary, wherein he stated that he advised defendants that it would be necessary to investigate

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> the actual facts on the part of the representing or concealing party. [Citations omitted.]

We have purposely not used the term "equitable" estoppel in this opinion because the estoppel principle discussed in *Pittsfield Twp* does not require knowingly false representations or concealment by municipality officials.

[16] Defendants citation to statements made by the trial court during its ruling as supporting evidence of various claims is unavailing and legally unsound; documentary evidence or admissions to allegations in the summary disposition motion were required, not judicial findings.

the matter further. Indeed, the enforcement report speaks of discussions between the township and the DEQ after May of 2006. Additionally, the DEQ permit submitted by defendants specifically provides that the permit did not waive the necessity of obtaining any necessary local permits.[17] In sum, it was improper for the trial court to grant summary disposition in favor of defendants on the basis of estoppel and the principals espoused in *Fass* and *Pittsfield Twp,* as well as their progeny, given the lower court record and the evidence, or lack thereof, presented below.[18]

We now turn to the issues regarding whether there was a violation of the 50-foot setback requirement. As indicated above, the trial court found that the new boatwell, as carved out of the land and filled with the waters from Big Wolf Lake, set a new high water line, and because the 50-foot setback started at that line and went in the direction of the land and the boathouse was within the high water line as viewed from the lake, there was no setback violation. The trial court failed to address the argument that the boathouse was not a "structure" and therefore not subject to the setback requirement.

"The rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances." *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998), citing *Macenas v Village of Michiana*, 433 Mich 380, 396; 446 NW2d 102 (1989).[19]

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[17] It would appear that this controversy was created because of uncertainty whether the DEQ had sole authority over the boathouse project or whether the township also had a say in the matter. The township's position appears to be that it never conveyed to defendants that the DEQ controlled the project in its entirety, but instead that the township was uncertain and needed to complete further review, ultimately determining that a township permit was still necessary but could not be granted because of the alleged setback violation absent the granting of a variance. Defendants on the other hand are of the position that the township conveyed from the beginning that the DEQ permit alone had to be obtained and that defendants, to their detriment, proceeded with the project on this belief. This disagreement and the applicability of estoppel can only be settled by a later motion for summary disposition following discovery or by trial.

[18] The township invites us to reverse and remand for entry of judgment in its favor on the basis that "exceptional circumstances" did not exist here, even assuming the truth of defendants' allegations, such that the general rule against estoppel as set forth in *Fass* should be applied. We decline the invitation because fact-finding based on yet-unknown evidence as to details surrounding the construction of the boathouse is necessary and because reasonable minds could differ on the issue.

[19] Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162; 691 NW2d 459 (2004). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was

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We first conclude that the word "structure" as used in the township's ordinance scheme encompasses the boathouse. Napoleon Township Ordinance § 3.3.3(E) requires the 50-foot setback with respect to defendants' waterfront lot, and Napoleon Township Ordinance § 2.1 defines "setback" in conjunction with a "building" or "structure." Neither party pays heed to the "building" reference. Rather, focus is placed on the term "structure," which is defined, as noted above, as "[a]nything constructed or erected, the use of which requires a temporary or permanent location on the ground or is attached to something having a permanent location in, on, or below the ground except parking lots, driveways, sidewalks, and signs." Napoleon Township Ordinance § 2.1.

Defendants argue:

> The covered boatlift portion of the project is open on all four (4) sides, with one side facing directly into the waters of Big Wolf Lake. Furthermore, the covered boatlift is supported by steel beams that are anchored to a seawall. Much like many seawalls in this area, the seawall and its steel support beams are driven (downward) into the "bottomland" of the inland lake or stream whose waters they are designed to repel. They are not attached in anyway to something having a permanent location in, on, or below the ground. Consequently, the covered boatlift is not a structure, as said term is defined in Napoleon Township's Zoning Ordinance. [Citations deleted.]

The township contends that "the roof of the covered boat slip/boat lift is supported by and thus attached to beams or pillars that are anchored in and have a permanent location in or on the ground." We agree with the township. Examination of the photographs of the boathouse reveals that the support beams or pillars rest not only on the top of the seawall but also partially on the top of the ground or land. Moreover, and contrary to defendants argument, the seawall has a permanent location in, on, or below the ground. The manmade channel or boatwell was clearly carved or dredged out of the ground, with the seawall being placed on the ground and along the border of the boatwell within which the water lies. The boathouse satisfies the definition of "structure" under the zoning ordinance.

Finally, with respect to the location of the high water line, the township, citing, in part, our Supreme Court's landmark decision in *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005), regarding the high water mark relative to Lake Michigan, and the definition of high water mark in our environmental statutes, specifically MCL 324.30101(k), argues that the line is that which is established naturally through the presence and continuous action of the lake's water. This does not include, according to the township, "an artificial boundary between water and land established through the dredging and construction of a small, manmade channel running

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intended." *Shinholster, supra* at 549 (citation omitted). If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Id.* "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

perpendicularly from the shore of the lake back into the lot itself." Defendants, also citing *Glass* and MCL 324.30101(k), counter that the waters from Big Wolf Lake flow naturally into the boatwell, and "[t]he presence and action of this water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." Defendants also argue that under MCL 324.30102 the DEQ has exclusive jurisdiction over inland lakes and has the authority to permit a person, as occurred here with defendants, to dredge bottomland or to enlarge an inland lake, thereby altering the high water line. Defendants additionally contend that the township's definition of waterfront lots include those having frontage on navigable channels and canals; therefore, the high water line is at the land's end of the boatwell. Consequently, defendants argue that the boathouse was within the high water line as viewed from the lake, and because the 50-foot setback runs landward from the high water line, there can be no violation of the setback requirement.[20]

We begin by noting that neither party contends that "high water line" is defined somewhere within the township's zoning scheme. In *Glass*, *supra* at 691-692, the Michigan Supreme Court adopted the definition of high water mark as found in *Diana Shooting Club v Husting*, 156 Wis 261, 272; 145 NW 816 (1914). Quoting *Diana Shooting Club*, the *Glass* Court defined high water mark as

> "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

MCL 324.30101(k) provides:

> "Ordinary high-water mark" means the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation. On an inland lake that has a level established by law, it means the high established level. Where water returns to its natural level as the result of the permanent removal or abandonment of a dam, it means the natural ordinary high-water mark.

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[20] We note that the township maintains that, assuming the area of the boatwell is considered in setting the high water line, a small portion of the boathouse nonetheless extends landward beyond the line, and therefore there still is a violation of the setback requirement. In light of our ultimate ruling, it is unnecessary to further consider this argument.

In our opinion, the definitions of high water mark as set forth in *Glass* and MCL 324.30101(k)[21] simply do not contemplate or encompass the small, selectively-located, manmade channel or boatwell created here, which is an aberration from the surrounding, continuous, and natural shoreline, such that the dredging of the boatwell altered the location of the high water line for purposes of the ordinance. Interpreting "high water line" as used in the ordinance in the manner suggested by defendants would clearly be in contravention of the intent of the township drafters who crafted the ordinance. Moreover, compliance with the setback requirement in regard to the project would reasonably require consideration of the high water line as it existed before the project was commenced, given that the project itself was to, in part, create the alteration in the lake, i.e., create the boatwell. Defendants' argument that the DEQ controls the dredging and enlargement of inland lakes is accurate, see MCL 324.30102; however, this does not mean that the boatwell involved here altered the high water line for purposes of interpreting and applying the zoning ordinance at issue. While we envision possible situations in which DEQ-approved larger scale alterations to a lake may result in a change in a high water line or mark relevant to zoning laws, we do not find such a case under the particular facts presented here.

On remand, the only issue to be entertained at trial or in any subsequent motion for summary disposition, and the only issue of relevance relative to any other further proceedings, is whether the township is estopped from enforcing the setback requirement against defendants. If estoppel is not established, a zoning violation is to be found with the appropriate relief granted, and if estoppel is established, defendants are entitled to a summary dismissal or a judgment of no cause of action. Of course, should defendants lose at trial, nothing in our ruling is to be interpreted as precluding them from requesting a variance consistent with applicable zoning law.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

[21] Because the parties place their focus and reliance on *Glass* and MCL 324.30101(k) in defining high water line, we shall limit our analysis to those authorities and resolve the issue solely within that context, without entertaining other avenues to discern the intent of the drafters.